DOCKET NOS. 12-11161 (L), 12-15457

United States Court of Appeals

for the

Eleventh Circuit

COQUINA INVESTMENTS,

Plaintiff-Appellee-Cross-Appellant,

v.

TD BANK, N.A.,

Defendant-Appellant-Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA IN
CASE NO. 0:10-cv-60786-MGC

BRIEF OF AMICUS CURIAE OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE TD BANK, N.A., SUPPORTING REVERSAL OF SANCTIONS

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STATEMENT OF INTEREST AND INTRODUCTION[1]

The Association of Corporate Counsel[2] is a global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 30,000 members who are in-house lawyers employed by over 10,000 organizations in more than 75 countries.[3] For 30 years, ACC has advocated across the country to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of in-house counsel and the legal departments where they work. In short, ACC serves as the voice as the in-house bar.

This case demonstrates the need for ACC to help courts better understand the role of in-house counsel and their organizations' legal departments. The

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[1] Pursuant to Fed. R. App. P. 29(c)(5)(A)-(C), *amicus* the Association of Corporate Counsel certifies that no party's counsel authored this brief in whole or in part, that no party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person – other than the Association of Corporate Counsel, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

Pursuant to Fed. R. App. P. 29(a), *amicus* further certifies that T.D. Bank has consented to the filing of this brief, and that Coquina has orally informed counsel for *amicus* that Coquina does not object to the filing of this brief. This satisfies Rule 29(a). *See* Fed. R. App. P. 29 Advisory Comm. Notes to 1998 Amendments.

[2] The remainder of this brief refers to *amicus* as, alternately, "the Association of Corporate Counsel" or "ACC." Additionally, this brief refers to each Docket Entry with the abbreviation "D.E."

[3] These include public and private corporations, public entities, partnerships, trusts, non-profits, and other types of organizations.

thousands of organizations that employ ACC members have legal departments that vary by size, function, expertise, and myriad other factors. As a result, when their organizations sue or are sued, the roles they play vary greatly as well. In some cases – rare ones – in-house counsel may themselves gather, review, and analyze all documents. In others, they may largely limit their role to supervising an internal effort to gather documents, possibly using outside vendors to help with the document collection, and may review only those documents that outside counsel identify as important. And in still other cases, legal departments hire vendors and outside counsel to identify, collect, and sort documents, while in-house counsel generally supervise and serve as liaisons with senior company management. Any assumption of some uniform practice across all departments and all cases is simply incorrect. There's no one-size-fits-all rule.

By failing to appreciate this truth about the in-house world, the district court opinion made two key mistakes, each of which has great potential to harm ACC's members. First, by inappropriately wielding Federal Civil Rule 37 to implicitly require a specific structure and function for in-house legal departments, it assumed that a single operating model should apply to all in-house legal departments. Second, as part of that model, it conjured up an impossible standard. When the bank did not meet that standard – by engaging in the sort of conduct that can routinely occur when companies hand over tens of thousands of documents during

discovery – the district court baselessly sanctioned it for acting "willfully," without a demonstration of actual intent. *Coquina Investments v. Rothstein*, No. 10-60786-Civ.-COOKE/BANDSTRA, (S.D. Fla. Aug. 3, 2012), D.E. 911 at 23-29 ("Sanctions Order").

This is not a case in which the district court made detailed factual findings to determine what counsel did, whether such organization and allocation of responsibility was intentionally defective, and what actual knowledge each inside lawyer had. Instead, it assumed an unrealistic allocation of responsibility to the bank's legal department. Having gone so far astray, the district court criticized the bank's lawyers for their work, *id.* at 24-26, and, at one point, spelled out the name of a key bank lawyer, *id.* at 26. Even without ordering personal sanctions against those lawyers, the opinion has stained the reputations of the bank's legal department generally, and of its in-house lawyers individually.

ACC prides itself on the expertise and experience of its members. But, contrary to the baseless assumptions of the district court opinion, in-house counsel are not all-knowing or all-powerful. No one is. Fortunately, it doesn't take omniscience to see that the district court's opinion casts a long shadow on a significant number of ACC's members. If this sanction stands as precedent, it will leave all in-house lawyers involved in litigation – along with their employers –

vulnerable to the fantastic views that the district court in this case held about their jobs.

STATEMENT OF THE ISSUES

1. Whether the district court held a sufficiently accurate view of the role of in-house counsel to draw the necessary conclusion of willfulness used to justify the sanction of TD Bank, N.A.

SUMMARY OF ARGUMENT

The district court makes the basic error of conflating a lack of perfection during discovery with the willfulness required for Rule 37 sanctions. Equally serious, if allowed to stand, the Sanctions Order would essentially use Rule 37 as a means to require wholesale restructuring of in-house legal departments, even though the actual rule nowhere indicates such an expansionist reach.

The district court's errors stem from a profound misunderstanding of how in-house legal departments operate. There is no single model that they follow: they are large and small, have different missions within their companies, may focus on different areas of law, and increasingly experiment with different models in order to derive more value from the aspects of their businesses that deal with the law.

This same rich variety characterizes how in-house legal departments manage litigation. In house lawyers – who may not have significant training in litigation –

rarely themselves perform all the tasks of gathering, analyzing, and producing documents to opposing counsel. More often, they hire third-party vendors to directly help them gather the documents, or they largely outsource document production and discovery to vendors and outside counsel while playing a supervisory role. Given that in-house counsel have many responsibilities – and often multiple litigation matters to oversee – it is common for in-house counsel to have little direct involvement in actually collecting or reviewing documents. Similarly, if in-house counsel attend trials, they usually merely observe and report back to management. Trial counsel, usually from outside law firms, make decisions about which documents to use, and how and when to present them.

The district court's opinion acknowledges none of this. Rather, it sets up a model for in-house law departments that is simply unrealistic. It assumes that in-house departments have infinite resources and that in-house lawyers have heroic powers. And then it punishes the bank's department for failing to meet this unreachable standard. The district court opinion also overlooks the realities of document production in large-scale complex litigation today. This case involved production of tens of thousands of documents; other cases involve millions. It is simply not possible for any person to memorize each item in such a mass of documents, or to recall them in an instant while sitting in a courtroom. But the district court seems to require precisely that of in-house counsel. Moreover, the

district court doesn't acknowledge that, in large document productions, it is common for large quantities of potentially responsive documents not to be identified or produced. Lawyers cannot achieve perfection. The best that they can do is labor in good faith. When they have done that, there are no grounds to issue sanctions.

Further, the Federal Rules of Civil Procedure do not justify using Rule 37 sanctions as a means to require wholesale restructuring of in-house legal departments. Nothing in the text of Rule 37 calls for it. Similarly, Rule 1 calls for courts to interpret the Federal Rules in a way to ensure that proceedings are "just, speedy, and inexpensive." And Rule 26(g)(1) requires that discovery responses require only a certification "to the best of the person's knowledge, information, and belief formed after a *reasonable* inquiry" (emphasis added). The district court's sanctions run far beyond these requirements.

Finally, the Sanctions Order harms the reputations of the bank's legal department and its individual lawyers. It leaves those individuals no ability to appeal, despite the lasting harm that the district will cause to them unless this Court reverses the sanctions.

ARGUMENT

I. In-House Legal Departments Come in all Shapes and Sizes.

There is and can be no such thing as a single correct model for in-house legal departments. About 17 percent of ACC's members work as the *only* lawyer at their companies. And about 32 percent more work in departments with between two and five lawyers. That means that just about half of ACC's members practice in small departments (and many have little or no litigation experience). At the other end of the spectrum, only about 13 percent of ACC members work in departments with more than 50 lawyers. ACC's remaining members work at legal departments whose size span the wide range between those poles.

Even law departments of comparable sizes can have completely different missions. Some focus more on contracts and transactional work. Others on employment law issues. Others on technology law, or energy law, or litigation, or securities, or real estate, or licensing, or mergers-and-acquisitions. ACC maintains committees focusing on over a dozen separate substantive areas, to serve the needs of a wide range of in-house legal departments and counsel.[4]

The work that in-house law departments perform on a day-to-day basis also varies greatly. In some departments, lawyers often "need to respond to day-to-day issues and emergencies, spending most of their time putting out fires rather than

[4] *See* http://www.acc.com/committees/index.cfm.

planning to build the next fire station." *ACC Value Challenge Practices for the Small Law Department*, at 6 (March 2012).[5] In others, there can be more specialization.[6] When in-house lawyers in law departments do specialize, they generally take on different roles. There is no reason to expect a lawyer with responsibility in one area to know about, or even talk about work with, a lawyer with responsibility in another area.

Finally, there is also another significant, and fairly recent, variable in organizing legal departments. Legal departments of all sorts are currently in a state of flux because organizations are trying to derive more value from their in-house operations.[7] They are experimenting with different systems and structures to allow them to effectively manage all of their clients' legal needs while still adding to their companies' bottom lines. This change stems from many factors, including the increasing expense of meeting legal demands, the rapid pace of technological change, and the burden of difficult economic times. As a result, in-house legal

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[5] *Available at* http://www.acc.com/valuechallenge/practices-for-small-law-departments.

[6] *See* "Keys to Effective In-House Lawyering: An Interview with the Mayo Clinic's Jon Oviatt," http://www.acc.com/community/clo/perspectives/upload/Perspective-John-Oviatt-Mayo-Clinic.pdf (discussing how one chief legal officer reorganized his legal department's system for negotiating contracts).

[7] *See, e.g.*, "ACC Value Champions FAQs," available at http://www.acc.com/valuechallenge/valuechamps/faqs.cfm and "ACC Value Challenge Legal Service Management Workshop," *available at* http://www.acc.com/valuechallenge/LegalServiceManagement/index.cfm.

departments now use more diverse legal structures than ever before to serve their clients' interests.

The point here is that there is no single way to organize an in-house law office. Another of ACC's committees, Law Department Management, offers its members a wide range of resources to consider using, depending on their needs and goals.[8] While standards and suggested practices exist, of course, there is no "best structure," let alone some mandatory minimum structure grounded in Federal Civil Rule 37. Organizations, their legal needs, and their in-house legal departments are simply too diverse.

II. Managing Litigation is an Art, Not a Science.

Given that in-house law departments configure themselves in many different ways, it should be no surprise that they employ a vast array of methods to litigate cases. Some organizations routinely hire outside law firms to perform all or part of their discovery and litigation work. *See, e.g.*, Kenneth A. Cutshaw, *Within the Legal Department, History Repeats Itself*, ACC DOCKET, Mar. 2010, at 22. Some small percentage of legal departments keep some or all litigation tasks in-house. *Id.* at 20. Organizations that do not hire outside law firms for their discovery work often still hire vendors to collect and identify documents.[9] In those circumstances,

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[8] *See* http://www.acc.com/committees/ldmc/index.cfm.

[9] In fact, the development of search protocols is now so complex that an entire industry of such vendors has sprung up. In light of the extremely demanding

the vendors perform the work, and the in-house counsel tend to manage or direct it in any but the smallest cases. [10] Some companies change their approach over time.[11] This varied approach toward handling discovery makes sense, because the decision to hire law firms to litigate is an expensive one. As one industry observer has written, "[o]utside legal costs are typically the largest single component of many organizations' legal budgets, with litigation often consuming the biggest share." Ronald F. Pol, *Litigation Costs Management: Revolution or Evolution?*, ACC DOCKET, Nov. 2009, at 16.

When in-house departments do hire outside law firms, they face myriad decisions about how to manage them. These concern everything from staffing to budgeting to fee structures to project management to evaluations to technology.[12] How individual law departments answer them, and how they respond to any given litigation matter, vary widely from case to case.

If there is any common pattern to the role that in-house counsel play during litigation, it is to ensure that documents are preserved, to implement a program of

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standards set by the courts for electronic discovery, specialized vendors are becoming more the rule than the exception. One such vendor worked with the bank in this case.

[10] In light of the extremely demanding standards set by the courts for electronic discovery, specialized vendors are becoming more the rule than the exception.

[11] *See, e.g.*, Barry Meier, *Ernst & Young Makes Deep Cut in Legal Staff*, N.Y. TIMES, Oct. 11, 1994 (*available at* http://www.nytimes.com/1994/10/11/business/ernst-young-makes-deep-cut-in-legal-staff.html).

[12] *See* http://www.acc.com/valuechallenge/ and http://www.acc.com/valuechallenge/about/index.cfm.

document recovery and transmission to outside counsel, and to assist outside counsel as necessary. For each of these tasks, inside counsel set up mechanisms and procedures. They do not have any obligation to review the documents themselves, nor is it routine for them to do so. To invoke an implicit obligation to review each and every document in each and every case would, at the minimum, displace most or all of their other duties and, in many cases, would be physically impossible. These realities of the in-house world directly undermine the sanction that the district court imposed. It stated "[i]n-house counsel did not participate in preparing witnesses for deposition or trial," Sanctions Order at 25, as if that somehow demonstrated an abdication of responsibility. The district court, however, entirely failed to explain why in-house counsel might have such obligation in the first place.

Put another way, and as is noted above, many in-house counsel lack litigation expertise. Those whose jobs do involve litigation often supervise multiple cases in multiple jurisdictions. To expect them to participate in the deposition or trial preparation of every witness – or indeed any witness – is unrealistic and doesn't jibe with how the industry operates.[13] These tasks are

[13] It is important to note that meaningful deposition or trial preparation of a witness involves much more than being present for such preparation. It requires a detailed knowledge of (1) all relevant documents produced by every party in the case, (2) all prior sworn testimony, and (3) the anticipated trial strategy and tactics of all parties. Any in-house counsel who tried to participate in preparing a witness

quintessentially the role of trial counsel. It is much more common for inside counsel to be supervise, communicate with senior company managers, and help with logistics. There is no obligation – under Rule 37 or anything else – for inside counsel to entirely duplicate the work of the very lawyers hired to do that job.

The same is true at actual trials. The district court opinion also assumes that inside counsel should and do double-check trial counsel's every move in the courtroom. Again, this is simply not the case. Many in-house counsel have more experience in other aspects of law, and less in litigation. And when an in-house lawyer does attend a trial, she or he is usually there to observe and to report back to management. Decisions about which document to use, and when to use it, rightly belong to the trial team.

Coquina suggested in the district court that in-house counsel could be presumed to have "washed [their] hands of the process"[14] if they did not "remain in close contact with outside counsel about *every* aspect of the case, down to the gathering and analysis of key documents."[15] That presumption flies in the face of modern-day practices of retaining outside counsel, as noted above. It also finds no

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before expending significant effort to master these areas would waste everyone's time.

[14] *Coquina Investments v. Rothstein*, No. 10-60786-Civ.-COOKE/BANDSTRA, Plaintiff's Supplemental Memorandum Regarding Defendant's Discovery Misconduct, D.E. 883 at 26, n.10 (Jun. 4, 2012) ("Coquina Memo").

[15] *Id.* at 26 (emphasis added).

support in the Corporate Counsel Guidelines that Coquina relies on. *Id.* (*citing* John K. Villa, CORPORATE COUNSEL GUIDELINES §§ 4:8, 4:13 (2011). That treatise, and every other treatment of in-house counsel practice that ACC is aware of, contrasts the obligation of inside counsel to be strategic in their monitoring of outside counsel, *see id.* at § 4:8 & 4:13, with the retained outside counsel's particular need for "meticulous preparation" for trial. *See id.* at § 4:1. In other words, as this brief has emphasized, there is no obligation for in-house counsel to participate in the minutiae of litigation.

In short, there is no set industry model for how in-house lawyers respond to legal projects generally, or to litigation and discovery in particular. Sometimes they take a hands-on approach. More likely they hire third-party vendors to assist them directly, or they hand off significant responsibility to the outside law firms they hire while still supervising and lending support that is necessary and appropriate. There is no basis to assert that in-house lawyers usually should double-check the documents that outside lawyers produce to opposing counsel, let alone how those documents are transmitted. There is also no basis to assert that in-house lawyers usually sit in on preparation of witnesses, or attend depositions or trials. Maybe they do. Maybe they don't. Every situation is different.

III. The District Court Opinion Had No Basis To Assert That In-House Legal Departments Should Conform to a Single, Unattainable Model.

Despite this background, the district court seems to have a single – and unattainable – model in mind for how in-house legal departments should function. For example, the district court opinion contained the following statements:

- "TD Bank acted willfully in failing to comply with its discovery obligations and assist its outside counsel to properly litigate this case." Sanctions Order, D.E. 911, at 23.
- "TD Bank would have this Court believe that . . . [almost] none of its approximately fifteen in-house lawyers or its representatives who sat through trial had any idea what the critical documents in this case were supposed to look like." Sanctions Order, D.E. 911, at 24.
- "It appears that TD Bank's in-house counsel were conspicuously absent from any involvement in supervising or assisting in the litigation of this matter. In-house counsel did not participate in preparing witnesses for deposition or trial." Sanctions Order, D.E. 911, at 25.
- "Further, TD Bank compartmentalized its groups of attorneys and segregated information from the trial attorneys in this case." Sanctions Order, D.E. 911, at 26.
- "The principal contact person at the Bank . . . , who is head of TD Bank's U.S. litigation department, never informed [one law firm] of the nature of [a

second law firm's] and the consultant's work, even though it went to the heart of this litigation." Sanctions Order, D.E. 911, at 26.

Taken together, these statements sketch out what the district court imagined as the working model for every in-house legal department: All in-house lawyers who might attend trial must have a thorough and precise knowledge of each and every one of the tens of thousands of documents that might have been produced in a case, or even considered for production. (Those lawyers also presumably have perfect vision, since they might well be sitting in the public seats, away from the counsels' tables.) No matter how exorbitantly expensive, they must assist in litigation, no matter what other responsibilities or training they have. They must help to prepare witnesses for deposition and trial. No managers of legal departments may assign other lawyers to specialize, for fear of compartmentalizing them. No matter how large the company or its law department, the head of litigation (no doubt, the company must appoint a head of litigation) will keep all outside trial lawyers informed of the activities of any other lawyer who is working for the company on any issue. Even if those projects are irrelevant or privileged, opposing counsel might want to know about them, which apparently makes them fair game. And, if any in-house lawyers ever fail to achieve perfection, they must have done so on purpose.

ACC has not heard of any law department that functions like this. If nothing else, the sheer expense might well overwhelm companies that tried it. When the district court assumed this is the *norm* for in-house law offices, it engaged in unmoored speculation or worse. Significantly, the court did not base its vision of a model law department on any industry literature, and made no findings of fact about industry norms. When the court took the further step of issuing sanctions for the failure of the bank in this case to live up to this ethereal standard, it invited reversal by this Court.[16]

IV. The District Court's Sanctions Ignore the Difficult Nature of Document Production in Large-Scale Complex Litigation.

In addition to taking an unrealistic view of in-house legal departments, the district court took an equally impractical view of how complex litigation operates. Here, the bank produced tens of thousands of documents to Coquina, and internally reviewed many more. That is far beyond what most anyone is capable of memorizing. Yet the district court issued sanctions in part because it claimed that *multiple* in-house lawyers should have recalled precisely what each and every

[16] Though it might not seem possible, Coquina asked the district court to go even further. In one of its memos to the court, it criticized the bank for failing to offer all of its "in-house attorneys or other personnel to testify about their own role in the discovery process." Coquina Memo, D.E. 883 at 12. *See also id.* at 26. Putting aside the logistics, such a request, if granted, would likely violate attorney-client privilege and work-product protection. It certainly would tear at the fabric of trust between the bank and its lawyers.

document looked like, down to the color of the ink. *Coquina Investments*, No. 10-60786-Civ., D.E. 911 at 6-11, 24.

It should be noted that this case is not even close to the largest ones in terms of sheer bulk of production. Consider another recent lawsuit. There, one party reviewed 97 million documents, produced approximately 3.3 million of them comprising over 20 million pages during 60 document productions, and participated in 60 depositions. Google Inc.'s Bill of Costs, Ex. A, at 2, *Oracle America, Inc. v. Google, Inc.*, No. 3:10-cv-03561 WHA, (N.D. Ca., Jul. 5, 2012).[17] A case of that magnitude highlights the absurdity of the perfection that the district court demands through its Sanctions Order here. But the demand is equally flawed even in less gigantic litigation.

The district court's order also ignores the hard fact that, in litigation of any size, the best that lawyers can do is work in good faith. They cannot achieve perfection. According to one recent study of the accuracy of document review projects, as many as *forty percent* of potentially responsive documents may not be tagged as such, even after lawyers have worked diligently to identify them. John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y.

[17] *Available at* http://www.groklaw.net/pdf3/OraGoogle-1216.pdf.

TIMES, Mar. 4, 2011, at A1.[18] Against this backdrop, there is no justification for the district court's sanctions.

In this case, the district court issued sanctions, in effect, because of the timing of when the bank produced some of the documents at issue. Put another way, the district court deemed that the bank's lawyers "acted willfully in failing to comply with its discovery obligations," Sanctions Order, D.E. 911, at 23, and then punished their client for producing results that align with what is statistically common. If this Court affirms this sanction, it would effectively endorse the idea that every lawyer who engages in document production, or who hires law firms or third-party vendors to do it, should expect to receive sanctions if the presiding judge, on a whim, feels like issuing them.

V. The Federal Civil Rules Do Not Demand Perfection, and Should Not Serve as a Basis for Reshaping In-House Legal Departments.

The Federal Rules of Civil Procedure do not anticipate that courts will conflate a lack of perfection with a willful failure to comply with discovery obligations. The text of Federal Civil Rule 37 doesn't do that, either. But that is precisely what the Sanctions Order does.

The district court's error becomes clearer in light of Federal Civil Rule 1. It states that *all* of the civil rules "should be construed and administered to secure the

[18] *Available at* http://www.nytimes.com/2011/03/05/science/05legal.html?pagewanted=all&_r=0.

just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Requiring litigants to stamp out every single wrinkle in a review of tens of thousands of documents – and punishing parties who do not – is not just, would be the opposite of speedy, and would cost unimaginable amounts of money. Similarly, Rule 26(g)(1) says that discovery responses should certify "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry." Fed. R. Civ. P. 26(g)(1). What the district court here seemed to require was not a reasonable inquiry, but a perfect one. None of the rules require that.

Additionally, we note that the district court's Sanction Order distorts the purpose of Rule 37(b). That rule seeks to regulate conduct *during* litigation, and specifically obstructionist conduct that all lawyers – in-house or not – should be punished for when appropriate. But the district court here has used that litigation-based rule to direct how law departments should be structured and should function, as discussed above in Section III. Rule 37(b)'s reach falls far short of such an expansionist reading of the rules, which would hardly be "just." *See* Fed. R. Civ. P. 1.

VI. The Sanctions Order Unfairly Maligns In-House Counsel but Offers No Way to Clear Their Names.

Finally, even if this Court affirms the judgment below, it should vacate the Sanctions Order with respect to the role of in-house counsel. This is because the Sanctions Order incorrectly discredits the reputations of the bank's in-house

counsel – one by name – but affords them no way to clear their names. That's because the order declines to actually impose sanctions on any individual lawyers. *See* Sanctions Order, D.E. 911, at 29. If it had, these lawyers would, in one sense, be in a better position – they could individually appeal the sanction. Unless this Court reverses the Sanctions Order, the reputations of the in-house lawyers referred to in it will remain smeared, and the individuals whose careers will be affected will have no recourse.

* * * * *

If this Court allows the Sanctions Order to stand, ACC's members will suffer two serious harms. First, they will be vulnerable to other courts that use it as precedent to sanction routine in-house conduct as a willful failure to comply with discovery obligations. Second, they will need to consider restructuring their legal departments to meet the district court's impossible standard. But there is no basis to support the model of in-house departments that the district court assumed, or what the district court claimed should be their role in litigation. In reality, in-house departments are markedly more varied than the Sanctions Order assumes, and often delegate significant discovery responsibilities to outside vendors or lawyers. Neither Rule 37 specifically, nor the Federal Rules generally, justify the sanction here. Those rules do not require perfection in discovery, and cannot serve as a basis to require rethinking the design and function of countless in-house legal

departments. Beyond all this, the Sanctions Order harms the reputation of the bank's in-house lawyers, but gives them no means to appeal.

CONCLUSION

For the foregoing reasons, this Court should reverse the Sanctions Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 4,749 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface – 14-point Times New Roman font – using Microsoft Word for Mac 2011.

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Dated: November 27, 2012

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